Office Supreme Court, U. S.
FILED
MAR 16 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

315 U.S. 821

No. 952

ALICE DUNN, KATIE DUNN, HELEN DUNN, and MARY MEANEY, and ALICE DUNN, KATIE DUNN, and HELEN DUNN, as Independent Executrices Substituted in Place of JOHN DUNN, Deceased,

Petitioners,

vs.

REPUBLIC NATURAL GAS COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals, Fifth Circuit, (per Hutcheson, Justice) is reported Dunn, et al. vs. Republic Natural Gas Company, 124 Federal (2nd) 128. The District Court's judgment has not been officially reported but appears at R. 112.

STATEMENT OF THE CASE

The Circuit Court of Appeals in its opinion (R. 469-475) sets out the matters involved. The statement as made by petitioners is completely contradictory of the statement of the Circuit Court of Appeals. The suit involves only the question of the amount of royalty, if any, that was due petitioners for 2,765,912 m. c. f. of gas, which respondent had used for jetting purposes. The trial court appointed a Master who heard the evidence and made fact findings. (R. 54-89). The trial court, after considering the evidence, the Master's findings, and the argument of counsel, prepared its own findings and conclusions. (R. 104-112.) On appeal, the Circuit Court of Appeals allowed petitioners to recover a royalty of one-eighth (1/8) (the royalty stipulated in the lease, R. 21) of the market value of the gas so used, in accordance with the terms of the lease and the contract of September 30, 1930. (R. 31).

Petitioners, in their application, omitted any reference to the contract of September 30, 1930. (R. 31). Under the terms of that contract, the respondent had the right to operate petitioners' lease without taking any gas. (R. 475). For this privilege, respondent had contracted to pay in excess of $250,000, and it has faithfully performed its part of the contract for more than ten years.

THE PETITION ADVANCES NO SUFFICIENT REASON FOR ISSUING A WRIT OF CERTIORARI.

As the sole ground for granting the writ, petitioners presented the question on pages 1-2 of their application:

> ". . . . whether the court had authority to disregard the Texas law, which allows the injured party to recover in such case, the highest market value of property converted, which indisputably was five cents per thousand cubic feet . . . ."

Thus, it is apparent that petitioners contend that the gas involved in this litigation was, first, converted by respondent and, second, that the market value of the gas was five cents per thousand cubic feet. Reply to these contentions will be made briefly in that order.

I. There is presented in the application of petitioners no question of public importance such as would authorize this Court to assume jurisdiction by certiorari, the question involved being merely one of local law of the State of Texas, arising under contracts.

II. The decision of the Honorable Circuit Court of Appeals is not in conflict with the Texas decisions cited by petitioners for that purpose.

A. There was no conversion in the case before the bar. The respondent owned the leasehold interest in all of the gas on petitioners' land and, under the terms of the lease (R. 21) and the contract of September 30, 1930 (R. 31), respondent had the right, subject to minimum payment requirements, to take or not to take gas from petitioners' land. Under the terms of the contract, if respondent elected to take and did take gas from petitioners' land, then, after paying the minimum requirement, it was obligated to pay royalty only on the market price for the remainder of the gas taken. Respondent having the contractual right to take the gas, there could be no conversion.

This conclusion is supported by the findings of the trial court and of the Circuit Court of Appeals.

(1) Petitioners, on pages 3 and 4 of their application, assert that:

> "The Circuit Court of Appeals held that one-eighth of the gas used by respondent to jet wells belonged to petitioners, that it was wilfully converted by respondent . . . ."

This assertion of conversion is in direct conflict with the opinion of the Circuit Court of Appeals and, we respectfully submit, is a mis-statement of that opinion. In this connection, the Circuit Court of Appeals, speaking through Justice Hutcheson, said:

> "Nothing in the leases or the contract obligated defendent to take any gas from plaintiff, and if defendant was so minded, it could operate the properties for the 21 years, without (fol. 478) taking a foot of gas. Such gas as it takes and sells it credits first to the minimum and they (then) pays for it at prices it receives. Beyond this the contract imposes no obligation upon it. Under the facts of this case showing that the use of the gas for 'jetting' was *reasonable and for the benefit of both plaintiffs and defendants, plaintiffs cannot complain of the use by defendants*, but only of its failure to pay plaintiffs for its part of the gas so used, the reasonable value thereof." (R. 474-475). (Italics ours).

(2) The trial court, like the Circuit Court of Appeals, held that the only market for the gas was for "jetting" purposes and that the respondent had the right to take the gas from petitioners' land:

> "There was no market for the 2,765,912 M. C. F. of gas except for 'jetting' purposes. The market price during the period in controversy, for gas for such purposes, was one cent (1c) per thousand cubic feet." (Finding, 15; R. 108).

> "Under Paragraph 3 on the contract of September 30, 1930, defendant had the right to take more gas from plaintiff's land than the minimum provided in said contract and to account to the plaintiffs for ⅛th of whatever price defendant received for said excess." (Conclusion, 5; R. 110).

B. Plaintiffs' contention that the value of the gas was undisputedly five cents per thousand cubic feet is in direct conflict with the evidence, the finding of the Master, the trial court's finding, and the holding of the Circuit Court of Appeals.

(1) The Master found:

> "The reasonable market value of gas for 'jamming' oil wells during the period of July 1, 1937, to July 5, 1939, was 1c per thousand cubic feet of gas." (Finding XXI; R. 88).

(2) The trial court found:

> "There was no market for the 2,765,912 M. C. F. of gas except for 'jetting' purposes. The market price during the period in controversy, for gas for such purposes, was one cent (1c) per thousand cubic feet." (Finding, 15; R. 108).

(3) The Circuit Court of Appeals held:

> "The Master and the district judge found that there was no market for the gas in question except for 'jetting,' and that the market price for this use was one cent per m. c. f., and this finding as to the market price is not questioned." (R. 474).

III. The petition does not present a question of law. On the contrary, two questions of fact are presented. First, was there a conversion? Second, what was the market value of the gas? Respondent respectfully submits that since it had the contractual right to take the gas and since

the lower courts have found that the use which respondent made of the gas was reasonable and justified, there could be no conversion. The Master, the trial court, and the Circuit Court of Appeals each found that the market value of the gas in controversy was one cent (1c) per thousand cubic feet, and the Circuit Court of Appeals allowed petitioners to recover their royalty on that basis for the 2,765,912 m. c. f. of gas.

CONCLUSION.

It is respectfully prayed that the petition for certiorari be denied.

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